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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1068

CARL N. SVEJCAR,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Carl N. Svejcar, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, is reprinted as App. A, *infra.*

## JURISDICTION.

The judgment of the Court of Appeals was entered on December 4, 1972. Petition for rehearing *en banc* was denied on January 2, 1973 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED.

1. Whether an instruction defining "knowledge" that states "no person can intentionally avoid knowledge by closing his eyes to acts which prompt him to investigate" fails properly to instruct the jury, unless joined by the specific admonition that a conviction cannot be based on "negligence," as given in *Spurr* v. *United States,* 174 U.S. 728, 43 L. Ed. 1150.

2. Whether a defendant in a federal trial has a constitutional right to have a jury instructed concerning his theory of defense.

3. Where the main thrust of the government's case against defendant is that he made false reports to an examiner of the Federal Home Loan Bank, as to the expectations of a Savings and Loan Association to make a gain from the completion of certain real state transactions, and where the government has presented evidence that said institution suffered a loss, does defendant have a constitutional right to demonstrate by expert witness, who summarizes voluminous documents that, upon completion of the real estate developments, the Savings and Loan would in fact have enjoyed a gain?

4. Should petitioner have been entitled to an instruction that testimony unfavorable to the government would have been given by an unindicted co-conspirator under government subpoena and later "tendered" to defendants who declined to talk to defense counsel and was called by neither side?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Pertinent portions of U.S. Const., Amend. 5, and of 18 U.S.C. §§ 657, 1001, 1006, 1008, and 1341, are set forth in App. C, *infra.*

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## STATEMENT OF THE CASE.

*The Indictment*

Petitioner was charged in a six count indictment. Count I charged the petitioner and Bernard Grizaffi and Leonard Falcone(*) with conspiring among themselves, and others unknown, to defraud and commit offenses against the United States by embezzling, abstracting and misapplying to their own use and benefit monies, funds and other credits of Apollo Savings whose accounts were insured by the Federal Savings and Loan Insurance Corporation (FSLIC); and with a variety of concealing material facts; making false entries in books to defraud examiners and auditors; making false statements to influence action of the FSLIC; and devising a scheme to defraud and use of mails, in violation of Secs. 657, 1001, 1006, 1008 and 1341 respectively.

Count I further charged that it was part of the conspiracy for the defendants Grizaffi and Falcone and their corporate entities to contract to purchase certain real estate from Apollo Savings (¶2, Count I), and that it was also part of the conspiracy for the funds necessary to purchase the real estate from Apollo to be obtained from other lenders and for Apollo effectively to guarantee the payment of principal and interest to the other lenders.

The conspiracy count further charged that defendants Grizaffi and Falcone purchased certain real estate from Apollo with funds from other lenders, the loans being guaranteed by Apollo; that Apollo would pay for improvements on the real estate so purchased and hired

(*) Co-defendants Bernard Grizaffi and Leonard Falcone, who were also convicted, are similarly filing a Petition for Writ of Certiorari in this Court.

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Grizaffi and Falcone as the contractors making the improvements; that the books of Apollo would falsely reflect that sales of real estate to Grizaffi and Falcone represented income and profit to Apollo; and that letters were sent as described in counts 2 and 3. Some of the allegations in the conspiracy count (pars. 4, 7 and 8) were stricken on government's motion the first day of trial.

Counts 2 and 3 charged the three defendants with uttering and publishing false statements for the purpose of influencing the action of the FSLIC by sending letters dated December 27, 1965 and January 19, 1966, respectively, to Richard Ceplecha of the Federal Home Loan Bank Board signed by the defendant Carl Svejcar which contained representations with respect to certain real property known as Georgetown West. Count 2 alleged as false defendant's statement that in selling certain parcels of real estate known as "Georgetown West" to Bernard Grizaffi and Leonard Falcone, and upon completion of the "Georgetown West" project, Apollo Savings would *"have an estimated gain of approximately $400,000.00"*, the defendants knowing said statement to be false;" (App. Vol. II, 11)

And Count 3 alleged as a false statement that the estimated cost for improvements to be made to acreage known as "Georgetown West" was $139,000, and that the gain to Apollo Savings from the sale of that acreage would be "somewhere in the neighborhood of $350,000.00", the defendants knowing said statements to be false. (App. Vol. II, 22)

Counts 2 and 3 were dismissed on motion of the government at the conclusion of all of the evidence as to the defendants Grizaffi and Falcone.

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Counts 4, 5 and 6 alleged the mailing of certain letters pursuant to the alleged scheme to defraud in violation of the mail fraud statute, 18 U.S.C., §1341.

## Nature of the Evidence

Petitioner, a graduate mechanical engineer, joined Apollo in 1961 as a real estate appraiser for a salary of $100 a week. He was hired by Mr. Kelly, the president of Apollo. In 1962, Kelly advanced petitioner to work in the "real estate held for development" department. In late 1962 or early 1963, he was made an asst. vice president, in 1964, a vice president, and in January 1965, an executive vice president. In his job in the "real estate held for development" department, he was to assist the president, Kelly. The department was composed of Kelly, Kelly's secretary, and petitioner. (Tr. 1441-1445, App. Vol. III, 798-800) Petitioner left Apollo in the fall of 1966, prior to many of the occurrences upon which the prosecution based its case. (Tr. 1515, App. Vol. III, 833, 837)

The transactions dealt with the sale of property by Apollo, based on contracts worked out by teams of lawyers representing Apollo, the buyers, and certain third parties who were lending money to the buyers. They were authorized by the Board of Directors of Apollo. The transactions involved were of great complexity. The overall transactions upon which the prosecution was based were legal in genre.

### *The 1964 Contract*

The initial contracts were negotiated by Kelly, lawyers for Apollo, and the purchasers. The sellers needed to obtain loans to make such purchases. Diversified Capital was to lend money to the purchasers. The initial contract, at the instigation of Marvin Greene, lawyer for

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Diversified Capital, was rewritten. (Tr. 176, App. Vol. II, 169) Petitioner was only present for short intervals during such renegotiations. Attorney Greene, a government witness, testified that his contract with defendant at the meeting was so slight that he could not identify defendant in court. (Tr. 205, App. Vol. II, 185) He testified that, although defendant may have "popped in and out", he was not privy to the conversations between the lawyers. (Tr. 180, App. Vol. II, 172)

That petitioner did not know of the additional aspects of all the agreements thrashed out by the lawyers is evident both from what contracts petitioner signed and did not sign, and from the procedure employed by Kelly to cause petitioner to sign Gov't. Ex. 3. Simply stated, Govt's. Ex. 3 is a contract for Apollo to sell the property to Colfax. This was signed by defendant at the direction of Kelly, pursuant to a special authorization.(*) No proof was offered by the government that petitioner knew what was going on in the negotiations of the contracts.

Petitioner did not sign the repurchase contract, Govt. Ex. 9, as he did the contract for the sale of the property, Govt. Ex. 3. Kelly did not instruct petitioner to sign Govt. Ex. 9. Petitioner's authorizations, per Def. Ex. 37 (App. Vol. I, 525) to sign contracts was very cleverly limited by Kelly to the sale of the property.

### The Disbursement of $50,000 From a Special Savings Account

Of prime importance in the government's structure of its case was a disbursement of $50,000 from a special

(*) Exhibit 3 was originally for signature of Kelly. *Vice* was penned in next to *President* for Svejcar to sign. App. Vol. III, 814-815.

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Apollo savings account to defendants Grizaffi and Falcone. (See Govt's final argument, Tr. 1843-1844, App. Vol. III, 982-983; Tr. 1927-28, App. Vol. III, 1032-1033)

As to petitioner Svejcar, the evidence demonstrates that although petitioner was signator as to such account, he had no authorization to disburse such money. He became signator in his capacity as an officer of Apollo (App. Vo. III, 827) at the direction of Mr. Diamond, lawyer for Apollo. The money could be released only after first receiving legal authorization from either Mr. Portes or Mr. Greene; It was disbursed by petitioner only on instructions by Kelly and with approval of Greene. (App. Vol. II, 822)

**Other Loans to Grizaffi and Falcone**

With regard to the other loans obtained for Grizaffi and Falcone, with assurance given by Apollo, petitioner's activity was that of an assistant proceeding to aid in obtaining those transactions the President of Apollo deemed appropriate. (Tr. 1495, App. Vol. III, 823, 826, 827, 828, 829, 833, 834, 835, 836, 837) There was no showing that defendant knew there was any impropriety in such action. Petitioner was not a lawyer. Nor was there anything in the nature of the transaction itself, to cause petitioner to believe that such action was improper.

**The Letters to Ceplecha**

An issue relative to these letters is whether petitioner's assertion as to cost to Apollo in developing the property and gain to Apollo was in error, and purposely so. These letters had to be approved by Kelly. (Svejcar's Exhibit 31, App. Vol. I, 529) That there was no intent to mislead the government by the reports to Ceplecha, is

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clear from Ceplecha's testimony. He testified that petitioner made it very clear that just very general estimates could be given, and confusion existed as to what was to be included in the costs. (App. Vol. II, 388-9) Although, the indictment focused in on partial language of the letters, a complete reading of the letters demonstrated that general, not definite estimates were being given. Immediately after that portion set out in the indictment, the Dec. 27, 1965 Letter, Govt. Ex. 21, reads:

> "A year passed by before all the engineering was completed and full approval was obtained by the Village of WoodDale. It was necessary for Apollo to spend many Thousands of dollars on engineering and the necessary off-site improvements to prepare for the beginning of construction. These costs are always greater at the start of any project, however, we were aware of this and made provisions for the recapture of these expenditures."

Similarly, the letter of Jan. 19, 1966, stated, "We have been asked to do several other improvements and these improvements will lower somewhat, the gain." (App. Vol. I, 115)

At the time of said letters, petitioner relied upon his original estimate and notes, based on his estimate of cost of perimeter improvements. (See Svejcar's Exhibit 41, App. Vol. I, 521—his working notes.) Petitioner also testified how he computed costs on the basis of data submitted to him.

Petitioner was found guilty on all 6 counts and sentenced to 4 years in custody.

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## REASONS FOR GRANTING THE WRIT.

### 1.

### THE JURY INSTRUCTION WHICH DEFINED "KNOWLEDGE" IN A MANNER THAT PERMITTED PETITIONER TO BE CONVICTED UPON A MERE STANDARD OF "NEGLIGENCE" IS UNCONSTITUTIONAL.

The government's theory was that petitioner's involvement primarily consisted of causing false entries to be made in the books and records of Apollo, and knowingly stating false information in certain letters to an examiner for the Federal Home Loan Bank. His defense, supported by evidence, was that he lacked knowledge of certain transactions, and he therefore lacked knowledge of false entries on the books and records of Apollo, and that his representations were made in good faith.(*)

Over objection, (Tr. 1786, App. Vol. III, 960) the court in defining "knowledge", instructed the jury that *"no person can intentionally avoid knowledge by closing his eyes to acts which prompt him to investigate."*

Petitioner does not dispute the validity of such a general rule, or of the right to have a jury properly so instructed. However, the instruction given, and specifically the phrase, "by closing his eyes to acts which *prompt* him to investigate," without more, permit the jury to convict due to his negligence. An instruction on this issue fails properly to state the rule, unless the jury is

(*) The undisputed evidence is that all acts of petitioner were at the direction of the president, Kelly, who profited from the transactions, but who was not indicted.

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instructed, in no uncertain language, that guilt cannot occur due to the mere mismanagement or negligence of defendant. *Spurr* v. *United States,* 174 U.S. 728; 43 L. Ed. 1150; *United States* v. *Erie RR Co.,* 222 F. 44.

Although said instruction is authorized by Instruction No. 4.05, *Jury Instructions in Federal Criminal Cases,* Seventh Circuit Judicial Conference Committee on Jury Instructions, Judge Walter J. LaBuy, Chairman, a review of the cases relied upon in the supporting comments demonstrates: (1) they are non-instruction cases, evaluating proper rules of law applicable to determining sufficiency of evidence by courts of review, and hence not proper authority as to instructions; and (2) the relevant cases in the comments which involved such instructions to the jury, also contained instructions specifically informing the jury that guilt cannot be based on negligence. Hence it is clear that the giving of the instructions given, absent other instructions, deprived petitioner of a fair trial.

The instruction, as given, did not follow the specific limiting admonition required to be given in *Spurr* v. *United States,* 174 U.S. 728, 43 L. Ed. 1150. The court set out as instructions given, the following:

> "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the checks mentioned in the indictment, that Dobbins and Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly, and in bad faith—these words mean substantially the same thing—shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge.

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> The court had also said that 'in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins and Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty.'"

Thus it is clear the reference to not closing one's eyes is proper and sufficient only where the jury is also fully and properly instructed on *good faith and advised that a person cannot be guilty due to negligence.*

*United States* v. *Erie R. Co.*, 222 F. 444 (Dist. Ct. N.J. 1915) is to similar effect. In that case, as in *Spurr,* it was clear that the language incorporated into LaBuy 4.05, was limited by a clear and specific instruction informing the jury that a conviction could not be based on negligence.

The court stated:

> "On this point, the jury were instructed, in substance, that before the company could be convicted they must find that the agents of the company, who were instrumental in fixing the rate, had knowledge of the facts which made the import rate unlawful, or that they willfully or intentionally remained in ignorance of them, in which latter case they would be charged in law with knowledge of such facts as reasonable inquiry or investigation would have revealed. They were specifically cautioned that negligence was not sufficient to constitute willful ignorance, in the following words:
>
> > *'I do not mean to be understood by this as stating that negligence is sufficient to charge one with knowledge, but his failure to make further inquiry must indicate a willful and perverse intention to remain ignorant. Nor can any finding of such willful ignorance be based on mere con-*

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*jecture or speculation, but must be based solely on the evidence in the case.'"*

Neither the government in its brief below, nor the Court of Appeals in its opinion, could cite one case where a reviewing court has held the rule properly stated in a jury instruction, without the added language that guilt cannot be based on negligence. *U. S.* v. *Squires,* 440 F. 2d 859, is a non-instruction case. Lay jurors should be instructed, as in *Spurr,* that negligence cannot be the basis for guilt.

Moreover, the absence of an instruction that guilt cannot be based on *negligence* is not cured by the court's instruction in regard to accident or mistake or good faith. There are degrees of culpability—from no culpability, i.e., accident, mistake, to civil culpability, i.e., negligence, to criminal culpability, which requires a mental state of a higher degree than that of negligence; and advising the jury as to accident or mistake or good faith is insufficient properly to advise the jury, unless they are instructed that guilt cannot be based on negligence. *United States* v. *Erie R. Co.; Spurr* v. *United States, supra.*

This court has always held that it is essential that a jury be properly instructed on the issue of knowledge. It has approved a definition of knowledge, which does not permit a defendant to avoid knowledge as in *Spurr,* which requires that the jury be fully and definitely advised that guilt cannot attach based on mere negligence. A standard instruction has been adopted for the Seventh Circuit which is a substantial deviation from that approved by this court in *Spurr.*

Certiorari should be granted to set out present standards of instructions to prevent unfair convictions based upon improper standards of negligence.

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2.

**PETITIONER WAS DENIED DUE PROCESS BY THE COURT'S FAILURE TO GIVE PETITIONER'S INSTRUCTIONS CONCERNING HIS THEORY OF DEFENSE.**

**The decision here is in conflict with the decisions in other circuits.**

In support of his defense, petitioner tendered his instruction, which was refused, as follows:

> If you find that the defendant, Carl N. Svejcar, relied upon his experience, and in accord with that experience, estimated in good faith the costs of installing improvements on land referred to in this case as Georgetown West, even though said estimates were not correct and he reported said estimates to examining authorities, then you should find the defendant not guilty of the charge of making false reports to examining authorities. (Defendant's Instruction No. 11; App. Vol. II 36-37)

The Court of Appeals held that it was not error to refuse a specific instruction of petitioner's theory of his defense of good faith, because the jury was generally instructed as to the concept of good faith. This holding is contrary to authority in other circuits that it is error to refuse to instruct upon defendant's theory of defense even if the jury was given general instructions somewhat encompassing the same principles.

Other circuits have held that neither giving general reasonable doubt instructions nor instructions generally on intent, incorporating the reference to good faith, alters a defendant's right to a specific instruction on his good faith defense, set out in reference to the facts of the case.

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In *Coleman* v. *U. S.*, 167 F.2d 837 (5 Cir. 1948), the court held that failure to give defendant's good-faith theory-of-defense instruction was error, even though the court had generally referred to "good faith":

> "In his main charge the trial court defined 'good faith' as meaning an 'honest belief.' But in view of the circumstances of the case that was not enough. *Good faith, if proved is ordinarily a complete defense and since their claims of good faith constituted the defendants' affirmative defense, they should have had the benefit of an emphasis by the trial court upon this point.*" (Emphasis ours)

In *Steiger* v. *United States*, 373 F. 2d 133 (10 Cir. 1967), the reviewing court reversed, holding that giving general instructions did not cure the trial court's error in refusing good-faith theory-of-the-case instruction, stating:

> "Good faith is a complete defense to a charge of using the mails to defraud in violation of § 1341, supra, and a defendant is entitled to proper instructions on the theory of his defense, if, as here, there is evidence to support such theory.
>
> * * * *The court did give general instructions on wilfulness, unlawful intent, specific intent, untruth of a representation, fraudulent statement, and acting on advice of counsel, but none of the instructions given fairly, clearly and fully submitted the defense of good faith interposed by each defendant.*" (Emphasis ours)

Similarly, giving general reasonable doubt instructions does not alter petitioner's right to have the jury instructed as to his theory of defense.

In *Salley* v. *U. S.*, 353 F. 2d 897 (D.C. Cir. 1965), defendant was convicted of sale of narcotics. His defense was that the purchase was not made from him. Defendant tendered an instruction on identity. The court denied the requested charge, and gave the "boiler plate instructon," adding only that "defendant denies that he made any such sale and

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takes the position that if Officer Brooks did buy these six capsules on September 3rd, he must have bought it (sic) from someone else * * *." The Court of Appeals reversed, stating:

> "The Government argues in its brief that from the instructions given 'it may fairly be concluded that the jury understood that its primary task was to determine if Officer Brooks was mistaken in his identification.' It may be that some jurors drew this conclusion, but the matter is too important to be left to inference and speculation." *Id.* at 899.

In *Richardson* v. *United States,* 403 F.2d 575 (D.C. Cir. 1968), defendant was convicted of robbery and assault. He offered an instruction that if one "takes the property of another but does so in the good faith belief that he has a right to take the property, the specific intent essential to the crime of robbery is lacking." This was refused. The Court of Appeals held it error to refuse such instruction, and that general instructions as to "intent" do not satisfy the requirement that the jury be instructed on the theory of defense.

Hence, a decision of the court in the instant case is in disagreement with the standard rule that:

> Where a defendant presents a theory supported by evidence, he has a right to have the jury specifically instructed upon that theory.

Certiorari should be granted to resolve the conflict betwenn the circuits on this crucial issue.

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3.

**PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT RELEVANT TESTIMONY.**

The indictment charged a conspiracy from January 1, 1964 to the return of the indictment, September 10, 1970. Count II(*) asserted violations in that petitioner:

> "* * * for the purpose of influencing the action of the Federal Savings and Loan Insurance Corporation, did make, pass, utter and publish and cause to be made, passed, uttered and published, a false statement, knowing the same to be false, as follows:
>
> > The defendants did falsely state and cause to be stated, in a letter from Carl N. Svejcar to Richard Ceplecha, an examiner for the Federal Home Loan Bank, that, in selling certain parcels of real estate known as "Georgetown West" to Bernard Grizaffi and Leonard Falcone, and upon completion of the "Georgetown West" project, Apollo Savings would "*have an estimated gain of approximately $400,000.00*", the defendants then and there well knowing said statement to be false;" (App. Vol. II, 11)

And, in Count 3,(*) that petitioner

> "* * * for the purpose of influencing the action of the Federal Savings and Loan Insurance Corporation, did make, pass, utter and publish and cause to be made, passed, uttered and published, a false statement, knowing the same to be false, as follows:
>
> > The defendants did falsely state and cause to be stated, in a letter from Carl N. Svejcar to Richard Ceplecha, an examiner for the Federal Home

(*) These were incorporated in Counts 1, 4, 5 and 6.

> Loan Bank, that the estimated cost for improvements to be made to acreage known as "Georgetown West" was $139,000, and that the gain to Apollo Savings from the sale of that acreage would be "somewhere in the neighborhood of $350,000.00", the defendants then and there well knowing said statement to be false;" (App. Vol. II 12)

Thus, a vital point in issue in this case was the truthfulness of petitioner's belief that upon completion, Apollo would make a certain gain. In support of the government's case, that petitioner's statements were false, the jury was overwhelmed with evidence leaving the impression that Apollo in fact sustained substantial losses due to the transactions. Redirect examination of government witness Gorman:

> Q. There was also some testimony relative to the absorption of the loss by Apollo. I believe you testified concerning an item to Mr. Faris?
>
> A. Yes, on the ledger cards.
>
> Q. Could you read Paragraph 10 of the Government's Exhibit 34?
>
> A. "It is hereby agreed between the parties hereto that Apollo's loss of $850,700 be settled to the sum of $740,800 which Colfax agrees to pay to offset such loss and Apollo agrees to accept in lieu of the $850,700, solely from the monies collected from Block II, excluding therefor any and all profits Colfax Builders, Inc., may realize from the development and sale of Block I and the commercial tract. Payments to Apollo of the stated settlement shall be repaid as more fully set forth hereinafter."
>
> Q. So, all losses referred to in Government's Exhibit 2 are not necessarily being recaptured pursuant to Government's Exhibit 34?
>
> A. That is correct.

Q. That would include the $33,000 to Mr. Faris possibly? (Tr. 758, App. Vol. II, 453)

During the direct and cross examinations of co-defendants Grizaffi and Falcone, there was also continual testimony that Apollo suffered losses (Tr. 972-976, 1004, 1184, 1197, 1362, App. Vol. III 562-565, 572, 665, 672-673, 758) The prosecution's final argument also implied that Apollo suffered a loss. (Tr. 1848, App. Vol. III 991; Tr. 1938-9, App. Vol. III 1038-39)

Petitioner attempted to present evidence tending to prove that had the transactions been completed, Apollo would have enjoyed a substantial gain. (Tr. 1686-1723, App. Vol. III, 917-934) The court, however, ruled that petitioner could not present such evidence. The court ruled that evidence of gain was irrelevant. (Tr. 1723)

That ruling constituted constitutional error. For, inundated by evidence of "substantial loss", the jury necessarily determined against petitioner on the issue of his good-faith belief that Apollo would have had a gain upon completion. Consistent with petitioner's constitutional right "to offer testimony," *Washington v. Texas,* 388 U.S. 14, 18 L. Ed. 2d 1019 at 1023 (1967); *In Re Oliver,* 333 U.S. 257, 92 L. Ed. 882 (1948), defendant should have been permitted to demonstrate that no loss occurred and, in fact, that Apollo would have enjoyed a gain.

In *United States* v. *Brandt,* 196 F. 2d 653 at 657 (2 Cir. 1952) the court stated:

> "Culpable intent or lack of good faith is not merely an element of the crime of fraudulent use of the mails; • • • it is in fact practically crucial where as here this scheme and the mailing are admitted. And hence, since it may be only inferentially proven, • • • *no events or actions which bear even remotely on its probability should be withdrawn from the jury unless the tangential and confessing elements interjected by*

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*such evidence clearly outweighs any relevancy it might have.*" (Emphasis ours)

In *United States* v. *Frank,* 220 F.2d 559 (10 Cir. 1955; mail fraud prosecution) government evidence as to the lack of effectiveness of an "oil discovery device" was held to be admissible. No doubt, defense evidence of the success of such device would have been admitted in the *Frank* case. Analogously, defense evidence that Apollo would have made a gain should have been permitted in this case.

In *United States* v. *Shavin,* 207 F. 2d 647 (7 Cir. 1961), (mail fraud), the court reversed due to the improper exclusion of evidence on the issue of defendant's good faith. In quoting from *Worthington* v. *United States,* 7 Cir., 1933, 64 F. 2d 936, the court stated:

> "It was competent, as stated in *Lefkowitz* v. *U. S.*, 273 F. 2d 664, 666 (C.C.A. 2), for both parties to 'show every part and parcel of such business, or the method of conducting it, calculated to shed light upon the intent and purpose of its managers.'"

To the same effect *Norcott* v. *United States,* 7 Cir., 1933, 65 F. 2d 913, certiorari denied 290 U.S. 694, 54 S. Ct. 130, 78 L. Ed. 597.

Assuming, arguendo, that based strictly on the indictment, the matter of Apollo's gains and losses was not an element of the offenses charged, that matter nevertheless became relevant and material once the jury had been caused to believe that Apollo had suffered a loss. Particularly in view of the defense based on petitioner's claim of good faith, it was prejudicial error to permit evidence of one complexion without permitting petitioner to rebut such harmful evidence. That amounted to denying petitioner the right to make his defense.

In *Hartman* v. *United States,* 215 F. 2d 386 (8 Cir. 1954), a basis for reversing defendant's conviction for filing false

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income tax returns was the exclusion of certain evidence. The court stated, p. 394:

> "Although testimony concerning the expense books should not have been admitted in the first instance, and the matter of cheating on expense accounts was irrelevant, after the government's evidence was received defendant should have been given opportunity to explain it away if he could."

Similarly this petitioner should have been permitted to demonstrate that Apollo had not, as the evidence up to that point indicated, suffered a loss, but that upon completion, there would be a gain.

The Court of Appeals asserts that since mere multiplication and division was involved, expert testimony was not needed, and points out that a defendant testified as to the matter sought to be introduced by means of the expert, and that defense counsel was permitted to argue to the jury that, had the transactions been completed, Apollo would have enjoyed a gain.

This argument avoids the issue. Petitioner had a right to prove to the jury that Apollo would have had a gain. Due to the complexity of the case,(*) the sole manner of adequately making such demonstration to the jury was the use of an expert witness who could incorporate all such material and testify to the results of such calculations and explain the means of reaching such results.

> "Preparation and submission to the jury of such summaries is *well-nigh indispensable to the understanding of a long and complicated sets of facts, and the practice has the sanction of the courts. United States* v. *Johnson*, 319 U.S. 503, 519, 63 S. Ct. 1233,

(*) There were 138 Government exhibits which filled 420 pages of the appendix; 33 exhibits offered by co-defendants which filled 97 pages of the appendix and 10 exhibits of defendant, which filled 20 pages of the appendix.

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87 L. Ed. 1546; *Beaty* v. *United States*, 4 Cir., 213 F. 2d 712, 719-721; *United States* v. *Caserta*, 3 Cir., 199 F. 2d 905, 908."

*Turner* v. *United States*, 222 F. 2d 926 at 933 (4 Cir., 1955).

As in tax cases, this was the sole practical manner of demonstrating the evidence. To prevent petitioner from so proceeding violates his right to present his defense. *Washington* v. *Texas*, 388 U.S. 14, 18 L. Ed. 2d 1019, 1023.

There is just no validity to the appeals court's position that no error occurred because a co-defendant had testified there would be no loss, and petitioner's counsel was permitted to argue the issue to the jury.

This argument overlooks the practical consideration that the impact on the jury is completely different where evidence is in the record on an issue from a disinterested party, than it is where, as here, the only evidence came from a defendant, and counsel argued the point. This is akin to the situation where counsel is permitted to argue a point to the jury, but the court fails to instruct the jury in accordance with counsel's argument. See *United States* v. *Phillips*, 217 F. 2d 435 (7 Cir. 1966). The thrust is completely different.

Similarly, in the case at bar, the evidence regarding possible gain came from a defendant (Grizaffi: Tr. 1002, App. III, 571) and thus probably carried little, if any, weight with the jury; and counsel's argument, having no factual basis other than such testimony had little, if any, effect.

Petitioner had a constitutional right to present to the jury evidence that Apollo would have had a gain in the manner "indispensible to the understanding of the long and complicated set of facts." The refusal denied petitioner's constitutional right to due process of law.

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We adopt and hereby incorporate by reference Point III of co-defendants' Petition for Certiorari being filed in this Court.

Certiorari should be granted to state the rule governing defendant's rights to present such expert witnesses—a right presently had only by the prosecution.

4.

**THE COURT OF APPEALS HAS APPLIED THE LAW REGARDING THE INFERENCE TO BE DRAWN FROM FAILURE TO CALL A WITNESS IN A MANNER CONFLICTING WITH THIS COURT'S DECISION IN GRAVES v. UNITED STATES.**

Petitioner adopts and hereby incorporates by reference Point II of co-defendants' Petition for Certiorari being filed in this Court.

## CONCLUSION.

Petitioner prays that the writ of certiorari be granted for the reasons stated herein.

Respectfully submitted,

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*Attorneys for Petitioner*

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## APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 71-1661
UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

BERNARD GRIZAFFI, LEONARD D. FALCONE, CARL N. SVEJCAR,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-CR-444

BERNARD M. DECKER,
*Judge*

ARGUED OCTOBER 19, 1972 — DECIDED DECEMBER 4, 1972

Before STEVENS and SPRECHER, *Circuit Judges*, and GORDON, *District Judge.**

GORDON, *District Judge.* The defendants Bernard Grizaffi, Leonard Falcone and Carl N. Svejcar were named in a six count indictment. Count I charged a conspiracy under 18 U.S.C. § 371 to do the following: to misapply the funds of the federally insured Apollo Savings and Loan Association (Apollo); to conceal material facts from and falsify statements to the government; to make false entries in the books and reports of Apollo with intent to deceive the Federal Savings and

* District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

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Loan Insurance Corporation (FSLIC) and others; to make false statements for the purpose of influencing the FSLIC; and to devise a scheme to defraud, the attempted execution of which involved the use of the United States mails.

Counts II and III alleged substantive violations of 18 U.S.C. § 1008 with respect to letters sent to an examiner for the Federal Home Loan Bank Board by the defendant Svejcar on December 25, 1965, and January 19, 1966. Counts IV, V and VI involved substantive charges of mail fraud under 18 U.S.C. § 1341 concerning the same scheme alleged in Count I, and specified certain letters caused to be mailed by the defendants.

The defendants Grizaffi and Falcone were building contractors and land developers who had financial dealings with Apollo. The defendant Svejcar was vice president of Apollo, in charge of the "Real Estate Held for Development" department. This case arose mainly out of an arrangement between the defendants whereby Grizaffi and Falcone were to construct a planned development on 82 acres of land owned by Apollo. The indictment depicted the agreement as one under which Grizaffi and Falcone purchased parcels of the real estate from Apollo by using funds borrowed from other lenders, with Apollo guaranteeing the loans. Apollo also agreed to pay for the improvements to the parcels purchased and hired Grizaffi and Falcone as contractors to make those improvements.

The indictment charged that the defendants caused the books and records of Apollo falsely to reflect substantial income from the sales by failing to reflect the contingent nature of the sales and by grossly understanding the actual and estimated costs of improvements. It further charged that the defendants thereby caused Apollo's books and records falsely to show such income as available for semi-annual dividends.

Three paragraphs of the conspiracy count were dismissed prior to trial on the government's motion. Counts

II and III were dismissed as to Grizaffi and Falcone at the conclusion of the defendants' case on the government's motion. After a two week trial, a jury returned guilty verdicts against the defendants on all the remaining counts.

The defendants Grizaffi and Falcone claim several errors on this appeal. The defendant Svejcar, who filed a separate brief, reiterates Grizaffi and Falcone's claims and raises additional isues.

## SUFFICIENCY OF THE EVIDENCE

The defendants argue that this court is required to test the sufficiency of the government's case in chief, and they contend that the government's evidence failed to establish a *prima facie* case. Since the defendants introduced evidence on their own behalf, however, "our determination must be made in light of *all* the evidence." *United States* v. *Tubbs,* 461 F.2d 43, 45 (7th Cir. 1972) (emphasis added). See also *United States* v. *Calderon,* 348 U.S. 160, 164 (1954). Furthermore, in determining the sufficiency of the evidence, we must view the evidence in the light most favorable to the government. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *United States* v. *Mims,* 340 F.2d 851, 852 (7th Cir. 1965), *cert. denied,* 381 U.S. 913 (1965).

We do not believe it necessary to detail the extensive evidence presented in this case, nor do we think it valuable for us to state the specific facts which that evidence tended to prove. We have reviewed the briefs, appendices and relevant portions of the record and find that there was ample material evidence from which the jury could find the defendants guilty.

## SUFFICIENCY OF THE INDICTMENT

It is urged that the indictment was insufficient insofar as it charged the defendants with wilfully misapplying or conspiring to misapply the funds of Apollo. It is also claimed that the alleged vagueness of the indictment

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allowed, and was reflected in, a prosecution of the
that continually shifted in theory.

We believe the indictment sufficiently alleged the es
tial facts constituting the offenses charged. Rule
Federal Rules of Criminal Procedure. Despite the
plexity of the factual circumstances involved, the in
ment fairly apprised the defendants of those activ
alleged to be unlawful. Count I charged a conspiracy
leged the illegal objects of that conspiracy, and st
several overt acts said to have been performed in furt
ance of that conspiracy. The remaining counts cha
specific substantive violations of federal laws alleg
committed by the defendants. Wilful misapplication
charged as one of several illegal objects of the conspir
As part of a conspiracy charge, it need not be allege
precisely as would be necessary in a substantive co
*United States* v. *Brandom*, 273 F. Supp. 253, 258 (
Wis. 1967).

Conviction under a conspiracy count is proper if
one of the illegal objects of the conspiracy is sufficie
proved. *United States* v. *Tanner*, ..... F.2d ..... (
Cir. 1972) (Slip Op. No. 17917, March 3, 1972). The
spriacy count charged the defendants with causing f
entries to be made in Apollo's books and records,
cealing of material facts from governmental agencies,
devising a scheme to defraud. We find, therefore, that
defendants' challenge to the indictment must fail.

Similarly, the defendants' claim of "shifting theor
on the part of the prosecution is without merit. The de
dants point to various portions of a complex record
urge that the government did not understand the fa
of the case and was unsure of its direction. We believe
record demonstrates that the government's presentat
was designed to confirm the charges in the indictm
in a reasonably consistent manner, under the factual
cumstances of the case.

## "AMENDMENT" OF THE INDICTMENT

As previously noted, three paragraphs of the conspiracy count were dismissed, on the government's motion, prior to trial. Paragraph 4 charged that it was a part of the conspiracy that Grizaffi and Falcone would be able to develop and sell the real estate with no investment or risk of their own. Paragraph 7 charged that Grizaffi and Falcone would receive construction loans from Apollo, that the proceeds of the loans would go to their lenders, and, therefore, that there would likely to insufficient funds available for construction. Paragraph 8 charged that substantial portions of the construction loans were to be treated as loan fees by Apollo, reflected in Apollo's books as earnings, with the likely result that insufficient funds would be available for construction. The defendants contend that the dismissal of these paragraphs constituted an unconstitutional amendment of the indictment.

In our opinion, the dismissal of paragraphs 4, 7 and 8, particularly coming as it did before trial, did not have the effect of amending the indictment but, instead, merely narrowed the issues presented. *Salinger* v. *United States,* 272 U.S. 542 (1926), *Thomas* v. *United States*, 398 F.2d 531 (5th Cir. 1967).

## EXCLUSION OF EVIDENCE

The defendants assign as error the court's exclusion of evidence which, the defendants claim, would have tended to show the profit possibilities of the arrangement. Assuming, arguendo, that such evidence was relevant in a case involving alleged false statements and records, we are not persuaded that exclusion was error.

Testimony of an accounting expert was excluded when it became evident that he would do no more than make basic arithmetical computations with figures supplied to him by counsel. It is a proper exercise of discretion for a court to exclude expert testimony concerning matters

clearly within the realm of jurors' comprehension. *United States* v. *Alker*, 260 F.2d 135, 155 (3rd Cir. 1958).

Other evidence was allowed tending to establish the defendants' point regarding profitability. Furthermore, counsel were permitted to argue the point to the jury, despite its questionable relevance. We are not persuaded that the court abused its discretion in excluding what evidence it did.

## REFUSAL TO GIVE INSTRUCTIONS

Error is alleged in the court's refusal to give a missing witness instruction. Edward Kelly, the chief operating officer of Apollo and an unindicted co-conspirator, was under government subpoena during the government's case in chief, but he was not called as a witness. The defendants contacted Kelly before the conclusion of the government's case, and Kelly was brought into the courtroom and made available to the defendants. The record demonstrates that the defendants had it within their power to call him as a witness. They did not do so, however, because Kelly refused to discuss the case with them, and, therefore, they were uncertain of the testimony he might give.

A missing witness instruction allows the jury to draw an unfavorable inference from a party's failure to call a witness when that witness is peculiarly within the party's power to produce, and his production would be natural but for some apprehension about his testimony. *Graves* v. *United States*, 150 U.S. 118, 121 (1893); *Burgess* v. *United States*, 440 F.2d 226, 231 (D.C. Cir. 1971); *Richards* v. *United States*, 275 F.2d 655 (D.C. Cir. 1960).

It cannot fairly be said that Kelly was peculiarly within the control of the government; there is also no reason to believe the defendants had any right to be any more apprehensive about his testimony than the government. Although Kelly, on advice of his attorney, refused to discuss the case with the defendants, it simply does not logically follow that his testimony somehow would have been unfavorable to the government.

The defendant Svejcar challenges the court's refusal to give two of his proposed instructions. The first would have called for a not guilty finding on the conspiracy count upon a determination by the jury that he was unaware of the actual method of recording transactions in Apollo's books. Such an instruction would have been improper. Svejcar was charged with conspiring to cause false entries to be made in the books. Proof of knowledge of the mechanics involved in making accounting entries was not required.

The second instruction refused was a general instruction dealing with the defense of good faith with regard to counts II and III. It is clear that the jury was properly advised of such defense by the instructions describing knowledge of the falsity of representations as a prerequisite to a guilty finding. Thus, refusal to give the good faith instruction was not error.

Svejcar also urges reversal on the basis of the court's failure to give an instruction concerning the weight to be given to the testimony of expert witnesses. He asserts that Richard Glomb's responses to hypothetical questions constitute expert testimony necessitating the instruction. Glomb was not presented as an expert. His testimony was elicited through hypothetical questions only after defense objections were made to the form of direct questions. However, even if we were to accept the proposition that the responses thereby became expert testimony, we do not find error in the court's refusal to give the instruction. At the time the instruction was requested, the court asked defendants' counsel whether there had been any expert witnesses. Glomb was not named at that time. The court properly refused the instruction because those who were named either were not experts or did not give opinions. There is no challenge to the refusal as to those witnesses, and a challenge will not be entertained at this time as to Glomb. Finally, if it were error to have refused this instruction, such error would fall far short of being prejudicial.

## THE "KNOWLEDGE" INSTRUCTION

The defendant Svejcar objects to the use of LaBuy Instruction No. 4.05. LaBuy, Manual on Jury Instructions in Federal Criminal Cases, 33 F.R.D. 523, 553 (1963). He claims that the last sentence of the instruction—"No person can intentionally avoid knowledge by closing his eyes to facts which prompt him to investigate"—is allowable only when qualified with specific instructions informing the jury that guilt cannot be based on negligence. We disagree. The instruction plainly states that knowledge cannot be "intentionally" avoided, and, consequently, it does not suggest that negligence is an acceptable basis for a finding of guilt. The instruction is a proper statement of the law. See *United States* v. *Squires,* 440 F.2d 859, 864 (2d Cir. 1971). Furthermore, the court informed the jury in other instructions that convictions could not be based on mistake or accident and that good faith was a defense.

## CONDUCT OF THE COURT AND JURY

Finally, the defendants urge that they were denied a fair trial by jury because of the court's "constant interjection as a prosecutor", the "inflection and emphasis" of the court's charge to the jury, and the short period of jury deliberation. We have studied the record, examined the court's charge to the jury, and reviewed the status of the evidence at the time of submission to the jury. The defendants' contentions are without merit.

Affirmed.

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Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 2, 1973

Before

Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. MYRON L. GORDON, *District Judge*

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BERNARD GRIZAFFI, LEONARD D. FALCONE, CARL N. SVEJCAR, *Defendants-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (70CR444) |
| No. 71-1661 | |

This matter comes before the Court on the "Petition for Rehearing and Suggestion for Rehearing En Banc" filed herein on December 19, 1972, by counsel for defendants-appellants, Bernard Grizaffi and Leonard Falcone; and the "Petition for Rehearing En Banc" on behalf of Carl N. Svejcar filed herein on December 20, 1972. On consideration thereof, no active judge of this Court having requested a vote as to En Banc Rehearing, and the judges of this panel having voted unanimously,

It Is Ordered that the two above-mentioned petitions for rehearing be and the same are hereby *denied.*

## APPENDIX C

### Constitutional Provisions And Statutes Involved

### United States Constitution

**Amendment 5**

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

### Title 18, U. S. Code

**§ 657. Lending, credit and insurance institutions**

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or by the Administrator of the National Credit Union Administration or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any

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moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

**§ 1001. Statements or entries generally**

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

**§ 1006. Federal credit institution entries, reports and transactions**

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the

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United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transactions, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

### § 1008. Federal Savings and Loan Insurance Corporation transactions

Whoever, for the purpose of inducing the insurance of the accounts of any institution by the Federal Savings and Loan Insurance Corporation or for the purpose of obtaining any extension or renewal of such insurance by such Corporation or for the purpose of influencing in any way the action of such Corporation, makes, passes, utters, or publishes any statement, knowing the same to be false; or

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Whoever, for the purpose of influencing in any way the action of such Corporation, utters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been uttered, forged, or counterfeited, or willfully overvalues any security, asset, or income, of any institution insured or applying for insurance by said Corporation—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

**§ 1341. Frauds and swindles**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to who it is addressed, anw such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

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